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IMPLIED LIMITATIONS UPON THE EXERCISE OF THE LEGISLATIVE POWER.¹

By the Constitution of the United States, the powers of the Federal Government are divided into Legislative, Executive and Judicial. All legislative power is vested in a Congress; the executive power is vested in a President; and the judicial power is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain.

This Constitution, with its amendments, contains an enumeration of the powers specifically conferred upon the Congress; it also defines the rights of the states and of citizens, which Congress and the several state legislatures may not impair or abridge.

The several state constitutions follow the Federal Constitution in separating the exercise of the legislative, executive and judicial powers. The constitutions confer in general terms upon a representative legislative body the power of legislation, but most of them, by many and diverse restrictions, greatly limit the subjects upon which valid legislation can be enacted.

No one here present doubts that the exercise of legislative power is subject to express constitutional limitation; and the judgments of federal and state courts in their several fields of action, rendering of no force statutes passed in disregard of the federal and state constitutions, are accepted by the people as well as the bar as the final utterance of the tribunal, upon whom the people as the ultimate sovereign have conferred the power of determining whether or not the legislature in fact have exercised their delegated powers in accordance with the chart of their authority as written in the Constitution.

The right and power of the judiciary thus to declare and enforce express constitutional limitations upon legislative action is recognized by lawyers of all schools of political thought, but we who follow proceedings in the courts must be

¹ An address delivered before the American Bar Association, Denver, Col., 1901.

impressed with frequent appeals to the judiciary to declare statutes void and of no force upon the ground that their provisions are contrary to principles of common right, either natural or political. The argument is, that the legislature is not itself a sovereign power, that sovereignty resides only in the people; that all powers of legislation delegated by the sovereign people to their representatives in legislature assembled are subject to limitations springing from the nature of free government: some of which may be expressed in written constitutions or bills of rights, but many of which must rest for support only upon fundamental principles of right and justice inherent in the nature and spirit of the social compact; and that these it is the duty of the judiciary to discover and declare, when the legislature is forgetful of its responsibilities, and through passion or partisanship enacts laws in disregard of the rights of citizens and the good of the state.

These appeals to the bench are sometimes supported by reference to such definitions of distinguished publicists, as

“The legitimacy of all laws originate not in the will of him or them who make the laws, whoever they may be, but in the conformity of the laws themselves to truth, reason and justice which constitute the true law.” (Guizot).

This assertion of the subordination of the legislative power to a higher unwritten law of justice and right is not a modern suggestion.

It was the basis of the eloquent argument of James Otis, upon an application for a writ of assistance, made in Paxton's case in 1763 before the Superior Court of Judicature for the Province of Massachusetts.²

We hear it repeated in our courts to-day, whenever a statute involving a subject of public interest is under consideration, and runs counter to the established and cherished views of a minority, respectable enough to demand a hearing and sufficiently intelligent to picture the inconsistency between the primary and fundamental right and the objectionable statute by which such right has been invaded.

Whenever the legislature changes the old order, and public

² Quincy's Rep. 51, Note 464.

feeling is aroused upon a political, social, or economic issue, the party which fails before the legislature is prone to appeal to the judiciary for a reversal of the legislative action.

Often the argument supporting such appeal is deduced from certain general clauses in the Federal Constitution, by which every state has been guaranteed a republican form of government, and the citizen is assured the equal protection of the laws, and warranted against deprivation of life, liberty and property without due process of law. But these clauses of the Constitution have received a settled judicial construction, limiting their operation to the protection of the states from the creation of imperial, monarchical or aristocratic forms of government as opposed to the republican form, and for securing to individuals enjoyment of life, liberty and property subject to an orderly and imperial administration of law.

When no help can be found in these general phrases, the judicial conscience is appealed to, as the ultimate guardian of the people's rights; and the argument is supported by venerable and high authority.

There is an old saying that "it is the part of a great judge to magnify his jurisdiction." This is often very persuasive, but it is a dangerous sentiment. It appeals to the intoxicating sense of exercising supreme power. The judge who accepts the conclusion is promoted from the limited sphere incident to the ordinary administration of judicial work to the high plane of measuring the right and wisdom of legislation by his own individual standard of what is right, wise and in harmony with fundamental principles of natural justice.

It would be a great mistake, however, to assume that this broad view of the power of the judiciary is only presented by litigants who find themselves unable to sustain their position upon any surer foundation. It has the seeming support of the great names of Coke, Hobart and Holt; and the *dicta* of these sages of the law are referred to with not unjustifiable confidence as sustaining the power of the court to abrogate any statute which to the mind of the judge clearly violates principles of natural right.

The citation most often heard is from Lord Coke in Dr.

Bonham's case,³ for false imprisonment against the president and censors of the College of Physicians of the City of London. The defendants justified under the charter of the College whereby the censors of the College were given power to fine any person who practiced medicine in the city without their certificate, and to enforce the fine by imprisonment.

Lord Coke held the plea insufficient, and among other things said :

"And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void ; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void ; and therefore in 8 E. 330 a. b. Thomas Tregor's case on the statutes of W. 2 c. 38 *at artic' super chartas* c. 9 Herle, saith, some statutes are made against law and right, which those who made them perceiving, would not put them in execution."

In a note Lord Ellesmere criticises the judgment of Coke, but it is supported by the manuscript observations of Sergt. Hill and by the opinion of Holt, C. J., in *City of London v. Wood*.⁴

"What my Lord Coke says in Dr. Bonham's case in his 8 Co. is far from extravagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament ; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party ; and an act of parliament can do not wrong, though it may do several things that look pretty odd, for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature ; but it cannot make one that lives under a government judge and party."

In *Day v. Savadge*,⁵ the question before the court being as to proof of the customs of the city of London, it was con-

³ 8 Coke, 114a.

⁴ 12 Mod. 669.

⁵ Hobart, 85a.

tended on behalf of the city corporation that proof of these customs should be by the certificate of the mayor and alderman of the city, and the statute was referred to as supporting this claim. Lord Hobart said :

“It appears that the custom of certificate of the customs of London is confirmed by parliament, yet an act of parliament made against natural equity, as to make man judge in his own case, is void in itself, for *jura naturae sunt immutabilia* and they are *leges legum*.”

Judicial utterances questioning the doctrine of legislative omnipotence are not confined to the other side of the water.

In *Calder v. Bull*⁶ Mr. Justice Chase said :

“I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. . . .

“There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican government, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.”

And in *Fletcher v. Peck*,⁷ Mr. Chief Justice Marshall said :

“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power. . . .

“To the legislature all legislative power is granted; . . . How far the power of giving the law may involve

⁶ 3 Dallas, 387.

⁷ 6 Cranch, 135.

every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated."

In the argument of Daniel Webster in *Wilkinson v. Leland et al.*,⁸ is found the following passage:

"Though there may be no prohibition in the Constitution, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of the social compact; such as giving the property of A. to B. Cited 2 Johns. 248; 3 Dall. 386; 12 Wheaton, 303; 7 Johns. 93; 8 Johns. 511."

And Mr. Justice Story in deciding the case said:

"In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice and without offence. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that the great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention."

I believe the bar of the United States recognize Mr. Justice Miller as the great expounder of the Constitution after the days of Marshall.

⁸ 2 Peters, 647.

In *Loan Association v. Topeka*⁹ he said:

"It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. . . .

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact would not exist, and which are respected by all governments entitled to the name."

These general remarks were in connection with a judgment that the exercise of the taxing power to aid a private business enterprise was in excess of the power delegated to the legislature to raise money by taxation.

So in the case of the *Regents of the University of Maryland v. Williams*,¹⁰ in holding that the legislature had no power to alter or amend a corporate charter without regard to the protection claimed under the prohibition of the Federal Constitution against any impairment of the obligation of a contract, C. J. Buchanan said:

"A fundamental principle of right and justice inherent in the nature and spirit of the social compact restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty and property of the citizens from violation in the unjust exercise of legislative power."

The early Connecticut cases are interesting because until 1818 the state had no constitution except such as might be found in the early charter granted by Charles II. Its courts therefore had to consider the validity of legislative action

⁹ 20 Wallace, 662.

¹⁰ 9 Gill & J. 365.

unhampered by any expressed restrictions except those contained in the Federal Constitution.

In *Goshen v. Stonington*,¹¹ it was said:

"With those judges who assert the omnipotence of the legislature, in all cases, where the Constitution has not interposed an explicit restraint, I cannot agree. Should there exist, what I know is not only an incredible supposition, but a most remote improbability, a case of the direct infraction of vested rights, too palpable to be questioned, and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary. If, for example, a law were made, without any cause, to deprive a person of his property, or to subject him to imprisonment; who would not question its legality, and who would aid in carrying it into effect?"

Again in *Welch v. Wadsworth*:¹²

"But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void."

And in *Wheeler's "Appeal from Probate,"*¹³ after referring to the broad powers of the legislature in that state, which is said to be "unrestricted in power and as omnipotent in a legal sense as the British Parliament," the court concludes in these words:

"If then an act of the state legislature is not against natural justice, or the national Constitution, and it does not appear affirmatively and expressly that there is some provision in the Constitution forbidding it, we must hold it to be *intra vires* and valid,"

indicating that there are certain undefined limitations resting on natural justice which the courts will enforce when the occasion arises.

But, notwithstanding the great names invoked to support

¹¹ 4 Conn. 209.

¹² 30 Conn. 155.

¹³ 45 Conn. 315.

this doctrine, it has been rejected by the courts in this country with great unanimity, wherever it has been necessary to make it the real ground of a decision; and an examination of the cases from which the opinions just quoted are taken shows, that if there was really an intention to assert that the judiciary have power to annul a statute because violative of the principles of natural justice and apart from express constitutional restriction, the remarks were *obiter dicta*.

It has been questioned whether Lord Coke ever intended to assert the doctrine as one defining the constitutional power of the judiciary as against the legislature, but it is pointed out that he rather meant to state a rule for the construction of statutes which upon first reading might appear contrary to common right and common sense. All would agree that it is the duty of the court in applying a statute, to assume that the legislature intended to prescribe rules of conduct and action which would be in accordance with principles of natural justice and the dictates of common sense, and hence that a judge should be astute to find a construction of the words of the statute which would not do violence to these principles. It would appear that Lord Coke in later utterances gave this meaning to his words in *Bonham's case*.¹⁴

This view has the approval of Chancellor Kent, who remarked in *Dash v. Van Kleeck*:¹⁵

"A statute is never to be construed against the plain and obvious dictates of reason. The common law, says Lord Coke,¹⁶ adjudgeth a statute so far void; and upon this principle the Supreme Court of South Carolina proceeded, when it held¹⁷ that the courts were bound to give such a construction to a statute as was consistent with justice, though contrary to the letter of it."

This understanding of Coke's doctrine is expressed in *People v. Gallagher*,¹⁸ where, in referring to the great difficulty of defining with any degree of certainty what these natural rights are, it was said:

¹⁴ See notes to Paxton's case, Quincy's Rep. 474. Appendix 13.

¹⁵ 7 Johnson (N. Y.) 502.

¹⁶ 8 Co. 118a.

¹⁷ 1 Bay 93.

¹⁸ 4 Mich. 244.

"No light can be thrown upon it by an examination of the English authorities. Parliament is omnipotent, and although it may pass a law in direct violation of every right of the subject, if the language is clear and incapable of construction, there is no court in the kingdom which has the power to pronounce it void. The extent of the power of the courts is the power of construction, which they will exercise when the law is expressed in doubtful terms, and this is all that is to be understood from the language of Lord Coke in Dr. Bonham's case, reported in the 8 of Coke R. 118 a."

Regard to this principle will save courts from many inconsistencies and will secure an administration of law tempered with wisdom and reason.

The South Carolina case, just referred to, is interesting and instructive. In 1788 a statute had been enacted prohibiting the importation of negroes as slaves and prescribing their forfeiture and a fine in case of violation. A family from British Honduras emigrated to South Carolina, bringing their slaves with them, and it was contended this was an importation of slaves prohibited by the statute. The court held it was not within the spirit of the law, which was to put an end to the slave trade and the importation of negroes by residents of the state, saying:

"It is clear that statutes passed against the plan and obvious principles of common right, and common reason, are absolutely null and void as *far as they are calculated to operate against those principles*. In the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be *evidently against common reason*. But we would not do the legislature who passed this act so much injustice as to sit here and say that it was their intention to make a forfeiture of property brought in here as this was. We are, therefore, bound to give such construction to this enacting clause of the Act of 1788, as will be consistent with justice and the dictates of natural reason, though contrary to the strict letter of the law; and this construction is, that the legislature never had it in their contemplation to make a forfeiture of the negroes in question, and subject the parties to so heavy a penalty for bringing slaves into the state, under the circumstances and for the purposes, the claimants have proved."¹⁹

¹⁹ *Ham v. McClaws*, 1 Bay (S. C.) 93.

A similar statute in Pennsylvania, designed to prevent the forcible carrying of negroes from Pennsylvania for sale in other states, was construed by the Supreme Court of Pennsylvania in 1789, and the court recalled and applied the felicitous illustration of Sir William Blackstone of the Bolognian Law against shedding blood in the streets. In construing a statute, the consequences and effects of its construction must be weighed by the court.

"The more comprehensive exposition, so warmly expressed on the part of the state, reminds us of the attempt under the Bolognian law mentioned by Puffendorf, which enacted, 'that whoever drew blood in the streets should be punished with the utmost severity,' that a surgeon who opened the vein of a person that fell down in the street with a fit, had incurred the penalty of the law. But after *long debate*, it was held not to extend to the surgeon. 1 Bl. Com. 60!"²⁰

The language of Marshall, Story and Chase and the Connecticut courts must also be read in the light of the question before the court, and in connection with other portions of the opinions and the judgments entered. It will then be seen that no extreme view of the judicial power to revise legislative action was maintained.

In *Calder v. Bull*, the question was, whether an act of the legislature of Connecticut granting a new trial in a contested will case violated any constitutional right of the parties as an *ex post facto* law. The judgment of the court was that such a statute was not unconstitutional. In this case the words *ex post facto* first obtained an authoritative definition, and were held not to be equivalent to retrospective; it was held that retrospective legislation was not necessarily invalid, although every statute should be construed to be prospective, unless the legislative intent to make it retrospective was clear. The language of Justice Chase, when read with the context, may reasonably be regarded as intended only to assert the existence of constitutional limitations upon the legislative power. When that opinion was written the right of the judiciary to enforce even express constitutional limitations had not been

²⁰ *Respublica v. Richards*, 1 Yeates, 480.

firmly established. The opinion does show that Justice Chase had no doubt of the principles which were afterwards established in *Marbury v. Madison*.

In *Fletcher v. Peck*, the question was as to the power of the legislature to annul a grant of land under which title had vested and possession been taken. The court held that a grant is a contract executed, and a statute purporting to annul the grant was unconstitutional, because it was a law impairing the obligation of a contract within the meaning of the express constitutional prohibition; and the language of Marshall well may have been intended only to state the principles controlling the relative functions of the legislature and judiciary in a constitutional government. This is not inconsistent with the doctrine that for a definition of the limitations upon legislative power, reference must be made to the written constitution which is the chart and guide of the judiciary.

In *Wilkinson v. Leland*, the question was the validity of an act of the legislature of Rhode Island, confirming the title of the grantee of an executrix, who had sold the land of a decedent for payment of debts. The validity of the statute was sustained, and the remarks of Justice Story heretofore quoted were simply an historical review of the nature of constitutional government in England as continued in Rhode Island, where at the time of that decision, in 1829, there was still no written constitution, and the legislature was still exercising the legislative powers originally granted by royal charter. Under such conditions Justice Story was of opinion that the fundamental rights guaranteed by Magna Charta were recognized as continuing of force in Rhode Island; for the power to legislate granted by royal charter was in accordance with the laws of England; but the question of how far the judiciary might annul a statute when in derogation of these unwritten rights, did not really arise, as the statute was held to be in harmony with fundamental principles of right.

In the Connecticut cases the question was as to the validity of retrospective legislation, particularly of legislation confirming a marriage which in its inception was unlawful, and the right of the legislature to make a law which might

operate on antecedent legal rights, was affirmed. The remarks of the court upon the abstract proposition were therefore *obiter dicta*.

Having referred to some of the authorities which are relied upon to sustain the right of the judiciary to assume the protection of the community from unwise and oppressive legislation, even though no conflict be shown with express constitutional provision, it is proper now to state that the accepted view of the American courts is that the judiciary can only arrest the execution of a statute when it conflicts with the provisions of the written constitution and that the courts may not run a race of opinion with the law-making power upon points of right, reason and expediency. The possibility that the legislature may enact unwise and unjust statutes does not carry with it the existence of a power in the judiciary to declare the unwisdom and correct the injustice. The exercise of a discretionary power, broad and comprehensive enough to meet the exigencies and wants of a great nation must carry with it the power to do both good and evil.

We have noticed the remarks of Justice Chase in *Calder v. Bull*. In the same case Mr. Justice Iredell expressed the other view :

“If, then, a government composed of legislative, executive and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void.”

In an early case the Court of Appeals of New York stated the principles which have been adopted and enforced in nearly every state. We can do no better than to state its conclusions in its own words :

“Every sovereign state possesses, within itself, absolute and unlimited legislative power. It is true that, as government is instituted for beneficent purposes and to promote the welfare of the governed, it has no moral right to enact a law which is plainly repugnant to reason and justice. But this principle belongs to the science of political ethics, and not that of law. There is no arbiter, beyond the state itself, to determine what legislation is just. . . .

"In a perfectly natural and simple distribution of the governmental powers it is not within the province of the judiciary to pronounce any act of the legislature void. It may, however, acquire this right through an artificial distribution of those powers, by means of the organic law. . . .

"To determine, then, the extent of the law-making power, we have only to look to the provisions of the Constitution. It has, and can have, no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose and undefined power to annul a law, because, in its judgment, it is 'contrary to natural equity and justice,' is in conflict with the first principles of government. . . .

"This power of determining what laws are expedient and just, which must of necessity be lodged somewhere, may be as safely reposed in the legislature, which returns its power so frequently through the elections into the hands of the people, as in the judiciary. The remedy for unjust legislation, provided it does not conflict with the organic law, is at the ballot-box; and I know of no provision of the Constitution nor fundamental principle of government which authorizes the minority, when defeated at the polls, upon an issue involving the propriety of the law, to appeal to the judiciary and invoke its aid to reverse the decision of the majority and nullify the legislative power. . . .

"I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside of the Constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion, which must place the courts above the legislature and also the Constitution itself. This is hostile to the theory of the government. The Constitution is the only standard for the courts to determine the question of statutory validity."²¹

This is not the time or place to collect the mass of authority which may be found in the federal and state reports in which the same doctrine has been applied.

A few general propositions may be stated which, with slightly varying language, have been announced in many

²¹ *Wynehamer v. The People*, 13 N. Y. 428.

courts, and may be confidently asserted to embody the accepted view of the law.

The fact that the action of the legislature is unwise, unjust, oppressive, or violative of the natural or political rights of their citizens, cannot be made the basis of action by the judiciary. It is no part of the business of courts to discuss the wisdom of legislation. However vicious in principle it may be, it is the plain duty of the court to enforce it, provided it is not in conflict with the written Constitution. The motives of the legislators, real or supposed, in passing an act, are not open to judicial inquiry or consideration. With these the courts have nothing to do, being beyond their province, and such considerations are to be addressed solely to the legislature. The court is not authorized to sit as a council of revision to set aside or refuse assent to ill-considered, unwise or dangerous legislation. Their only duty and their only power is to scrutinize the act with reference to its constitutionality, to discover what, if any, provision of the constitution it violates. If the legislature should pass a law in plain, unequivocal and explicit terms, within the general scope of their constitutional powers, there is no authority under our form of government to pronounce such an act void merely because, in the opinion of the judicial tribunals, it is contrary to principles of natural justice. To admit this power would be vesting in the court a latitudinarian authority which would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well being of society, and not in harmony with our theory of the division of the powers of government,

Courts cannot nullify an act of legislation on the vague ground that they think it opposed to a general "latent spirit" supposed to pervade or underlie the Constitution. To do so would be to arrogate the power of making the Constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both Constitution and people, and convert the government into a judicial despotism. Whilst legislative power can only be exercised within the limits prescribed by the Constitution, the court is equally bound to keep within the sphere allotted to it by the same

instrument. Judge Cooley, in speaking of limitations upon legislative authority, well says:

“Some of these are prescribed by constitutions, but others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion and conscience.”

The supremacy of the legislature within the field of its constitutional powers does not derogate from the dignity and power of the judiciary in its appointed work.

Upon the state legislature has been conferred the whole law-making power of the state except that which has been specially delegated to the National Congress. This law-making power, however, must be exercised subject to the limitations and prohibitions of the Constitution, which, as a permanent and paramount law settled by the deliberate will of the people as ultimate sovereign, curbs the will of the temporary majority and of the representatives selected to exercise the law-making power.

These constitutional restrictions it is the duty of the judiciary to make effective, whenever a litigant asserts a right or defends his action under a statute passed in derogation of the Constitution; but this is not because the judiciary have any control over the legislative power, but because the act is forbidden by the Constitution, and the Constitution is the paramount law.

In England, under the unwritten constitution, Parliament might be regarded as the highest court. As the House of Lords was the supreme court of appeal in the course of orderly litigation, an act of Parliament, both Lords and Commons assenting thereto, might avoid the effect of a judgment at law.

In some of our colonies, even after the Revolution, the distinction was not always clearly made between the legislative and judicial functions. The legislature was sometimes regarded as the court of last resort, and in many of the states the county courts exercised perhaps as many legislative as judicial functions. The distribution by constitutional enactment of the powers of government among different departments is a comparatively modern idea. By the *de*

facto separation of these powers in the practical administration of affairs, England showed to the theorists the advantages of entrusting functions of so diverse a nature to separate bodies. This was made the subject of observation by Montesquieu before the middle of the eighteenth century, and the importance of making certain provisions for it in the organization of the government was the subject of earnest thought by Madison.²² But now, by most of the state constitutions, the theoretical separation of the legislative from the judicial functions is clear. Just what is the real line of demarcation, however, is not always easy of determination. The fact that the British Parliament may have repeatedly enacted statutes of a given character does not prove that the statute is legislative in character. It is, however, in harmony with this theoretic separation between the legislative and judicial function to observe that delegation of an express power to one department may be equivalent to the prohibition of its exercise by another department.²³ As a corollary to this, courts of most conservative views have permitted inquiry into whether a particular statute imports the exercise of the legislative or the judicial functions. It is less difficult to state certain general propositions as to the character of legislative and judicial act than to draw with certainty the exact line of demarcation.

It has been well said that it is the province of the legislature to enact; of the judiciary to expound; and of the executive to enforce;²⁴ and that a legislature cannot declare what a law was, but what it shall be;²⁵ that the elements of judicial action as distinguished from legislative are that adverse parties litigate—private interests are involved—evidence of facts is to be received and weighed, and the facts are to be found—punishments are to be inflicted—forfeitures to be enforced; that legislation may affect rights incidentally—but cannot pass directly upon any question of controverted right.²⁶ The precise boundary of this power is a subject of

²² Federalist, No. 47.

²³ *State v. Staten*, 46 Tenn. 233.

²⁴ *Wayman v. Southard*, 10 Wheaton, 46.

²⁵ *Ogden v. Blackledge*, 2 Cranch, 272.

²⁶ *Flint Plank Road Co. v. Woodhill*, 25 Mich. 99.

delicate and difficult inquiry, into which a court will not enter unnecessarily.

As illustrating the distinction between these powers, it has been held that after property has vested in an heir at law, a statute changing the law as to the probate of testamentary writings under which a will, invalid at the death of the ancestor, could be probated, was unconstitutional. It was not legislative as to precedent cases, it also violated the constitutional prohibition against taking property without due process of law.²⁷

While the legislature may not affect vested rights by declaring that a former statute has a meaning contrary to that which is plainly written in its lines, until the judiciary has fixed the meaning of a doubtful law upon which contractual rights have vested, it may be explained by legislative enactment; but where the construction is not doubtful, and particularly where it has been under judicial cognizance, no subsequent act, whatever shape it may take—as for example using the words “it shall be construed”—can affect or change previous rights already fixed and settled.²⁸

The reason for the rule seems to be that pointed out by Chief Justice Gibson:

“A legislative mandate to change the settled interpretation of a statute, and uproot titles depending on past adjudications, or a legislative direction to perform a judicial function in a particular way, would be a direct violation of the Constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action. A court could not be bound by a mandate to decide a principle or a cause in a particular way. Such a mandate would be a usurpation of judicial power, and more intolerable in its exercise than a legislative writ of error, because the losing party would be concluded by it without being heard.”²⁹

An interpretation by one legislature of a statute written by another legislature years before would be an adjudication of the private rights which have arisen under it. A legisla-

²⁷ *Greenough v. Greenough*, 11 Pa. St. 489.

²⁸ *Lambertson v. Hogan*, 2 Pa. St. 25.

²⁹ *O'Conner v. Warner*, 4 W. & S. 227.

ture has no authority to change the laws of language. If given language does not express a given meaning, the legislature may use other language that does; but this will not change the meaning of the former language. In the very nature of language that is impossible.³⁰

But while the court may not by expository legislation affect vested property rights, it is well settled that curative and remedial legislation, such as that validating deeds and other muniments of title defectively acknowledged or recorded, or validating issues of municipal bonds when a popular vote has been informally taken, are proper exercises of the legislative power.³¹

There is also a large power over the remedy, and the legislative power has been upheld to direct by special statute the transfer of an indictment then pending from one district to another.³²

So a legislature unfettered by constitutional restrictions may exercise the power of confiscation.

In 1782, when there was no expressed limitation upon the legislature of Georgia, a statute was enacted confiscating the estates of persons guilty of treason, and this was sustained by the Supreme Court of the United States as a proper exercise of the legislative power.³³

Now the Federal Constitution and most of the state constitutions forbid any bill of attainder, whereby corruption of the heritable blood may be affected, but the numerous cases arising during and since the civil war under the confiscation acts of 1862 show a continued recognition of the scope of the legislative power.

The courts may not declare a statute void because of supposed repugnancy to the pervading spirit of the Constitution; it seems, however, that an act of the legislature can be declared void, though not transgressing the letter of any specific provision, because violating the spirit of the Constitution as deduced from that which is written. Yet such implied

³⁰ *Reiser v. The William Tell Saving Fund Association*, 39 Pa. St. 144.

³¹ *McMullen v. Lee County*, 6 Iowa, 391.

³² *People v. The Judge*, 17 Cal. 547.

³³ *Cooper v. Telfair*, 4 Dall. 18.

violation is exceptional, and must be made to appear beyond reasonable doubt. It is illustrated in *Page v. Allen*,³⁴ when in referring to the constitutional provision that the executive power is lodged in a governor, Thompson, C. J., said :

“It would be manifestly repugnant to these provisions of the Constitution if an Act of Assembly should provide for the election of two executives at the same election, yet it would be unconstitutional only by implication, there being no express prohibition on the subject.”

It may be stated, as a rule, that the limitations which are enforced are those found in the express terms of the Constitution, or which arise by necessary implication from that which is expressed.

There is an interesting discussion of limitations to be implied from those which are directly expressed, in *State v. Moores*,³⁵ where, quoting Von Holst, the court said :

“The legislative power of the state legislature, is unlimited as far as no limits are set to it by the Federal or the state constitution. This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the Federal government have certain “implied powers,” so it has never been disputed that the state legislatures are subject to “implied restrictions,” that is, restrictions which must be deduced from certain provisions of the Federal, or the state constitution, or that arise from the political nature of the union, from the genius of American public institutions.”

And further quoting Cooley on “Constitutional Limitations,” the opinion proceeds :

“It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power ; and if the authority to do an act has not been granted by the sov-

³⁴ 58 Pa. St. 338.

³⁵ 55 Nebraska, 490.

ereign to its representatives, it cannot be necessary to prohibit its being done."

It may also confidently be said that American citizens living under the protection of the Federal and several state constitutions do not need to invoke the protection of any doctrine of implied limitations upon legislative power. There are express constitutional provisions which can be relied upon to protect us in all the fundamental rights of freemen.

By the Federal Constitution, the citizen is guaranteed the protection of habeas corpus; freedom from bill of attainder and *ex post facto* legislation; freedom in religion; the right to peaceably assemble and petition for a redress of grievances; to bear arms; to be secure against unreasonable searches and seizures; not to be required to answer for a capital or other infamous crime, unless on the presentment or indictment of a grand jury, and in all criminal prosecutions to enjoy the right of a speedy and public trial by an impartial jury, with safeguards in the trial of the presence of adverse witnesses and assistance of counsel for defence. These guarantees, when coupled with the comprehensive clause that a citizen shall not be deprived of life, liberty and property without due process of law, nor shall private property be taken for public use without just compensation, leave few imaginable cases, where natural rights are not directly within the protection of the written Constitution.

Similar guarantees are given to the citizen in his relation to the state by the several state constitutions; and in many states numerous express limitations upon the legislative power protect the citizen in the undisturbed possession of property, and the exercise of all rights and privileges, which are regarded as the inalienable rights of freemen.

The courts never have shrunk from the duty of sustaining these expressed constitutional rights in all their vigor. The courage which induced John Marshall to say:

"That this court does not usurp power is most true. That this court dares not shrink from its duty is not less true,"

has been the spirit not only of his successors in that high tribunal, but of the larger circle, who perhaps, not in the eye

of the nation, but each in his own vicinage, have administered the law without fear or favor, so that the roll of the American judiciary is one which the nation justly delights to honor.

While it may be true as an abstraction, that there are certain absolute rights, and the right of property among them, which in all free governments must of necessity be protected from legislative interference, irrespective of constitutional checks or guards; that protection in the absence of constitutional limitation must be found in legislative fidelity and adherence to the principle of free institutions. If recreant, an appeal to the people is the only remedy.

If it could be conceived that a legislature should enact a statute within the general powers of legislation, not violating any express provision of the Constitution, but abhorrent to the common sense of all right-minded men—there is no immediate relief against such a statute within the Constitution. Those who come within its operations are left to the last resort which the Anglo-Saxon does not rashly permit himself even to contemplate. Revolution is always at the responsibility of those who undertake it. Failure of all other remedies, and ultimate success alone, warrant the step. Happily, the express limitations of our Constitution would seem to be an effectual barrier against any legislation, so abhorrent to common right as to arouse a sense of wrong inciting to this last mode of relief.

The assumption of authority beyond that of applying the terms of the written Constitution to each case as it arises, would be to place in the hands of the judiciary power too great and too undefined either for its own security and permanency, or the protection of private rights. In no case should a judge oppose his own opinion to the clear law and declaration of the legislature so long as it acts within the pale of constitutional competency.

Courts of justice are said in the *Federalist* to be “the bulwarks of a limited constitution designed to keep the legislature within the limits assigned to their authority.” By applying to legislation the tests of constitutional limitations, it has been possible in our land to realize the workings of free representative government as stated by Guizot:

“Liberties are nothing until they have become rights—positive rights formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not intrenched within guarantees. And lastly, guarantees are nothing so long as they are not maintained by forces independent of them in the limit of their rights. Convert liberties into rights, surround rights by guarantees, entrust the keeping of these guarantees to forces capable of maintaining them—such are the successive steps in the progress toward a free government.”

But to enlarge the functions of the judiciary into a general power of reviewing the work of the law-making body, with no certain guide except considerations of right, equity and justice, as conceived by the reviewing court, deprives the community of the advantages of the division of legislative and judicial functions between separate bodies.

We may give our unqualified assent to the sentiment presented by Lafayette to the French Assembly :

“The end of all political association is the preservation of the natural and imprescriptible rights of man, and these rights are liberty, property, security and resistance of oppression.”

But the definition of the rules whereby liberty is to be enjoyed by each citizen without trespassing upon the rights of others, and how property shall be used so that it be not injurious to a neighbor, are matters which are strictly within the scope of the law-making power.

At common law, in the absence of legislation, the maxim, “*Sic utere tuo ut alienum non loedas*,” may be sufficient to enable a court to guide a jury to do justice between citizens; but the ability of a court and jury to state and apply the common law, is not exclusive of the power of the law-making body to modify the law or apply it to the changing conditions of a developing community.

The legitimacy of the laws must rest in the will of the law-making body.

In the inaugural address of President Jefferson is an expression which has been copied into the bills of rights, which are a part of the constitutions of several states :

“That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.”

It should, therefore, not be forgotten that the powers of the judiciary, as well as of the legislature, have their limitations.

The real and enduring power of the judiciary should not be impaired by a usurpation of powers, the responsibility for the exercise of which rests with the legislature. The interests of the public at large, as well as the rights of individual citizens, will be best conserved by always keeping clearly in view where the responsibility for unjust or unwise legislation rests. The supremacy of the legislature, so long as its acts do not contravene defined constitutional limitations, does not relieve it from the obligation to legislate in conformity with those rules of truth, reason and justice which, according to Guizot, constitute the true law. The difference, between the view which is the accepted American view and that seemingly announced by Lord Coke, is, that such limitations upon the legislative power as spring from natural justice and equity and the principles of free government, must depend for their enforcement upon legislative wisdom, discretion and conscience. Supremacy of the legislature to legislate within the limits of its constitutional power, does not mean irresponsibility. Legislators are representatives and agents with limited terms and must answer to their constituents—the people—for the exercise of their delegated powers. While the power of the legislature, subject to the expressed constitutional limitations, may not be questioned before judicial tribunals, the propriety of their acts may be reviewed on election day, and the sovereign may then correct every departure from the all-pervading spirit of free institutions. We believe the judiciary can best accomplish its appointed work by turning a deaf ear to all arguments which seek to impose upon it the duty of revising the work of the legislature upon the plea that natural right, justice, equity and the latent spirit of the Constitution and free government may control. Admitting such considerations would impose upon the courts a duty not judicial in its nature; the determination not of

what the law is, but what it should be. Judges are not selected with a view to any such duty. I do not say that may of them may not in fact be well fitted for its performance, but they are not chosen for it. The determination of what the law should be under our theory of government is for the people, speaking through their appointed representatives in legislature assembled.

The conclusion would seem to be: the law-making power has been entrusted solely to the legislature, and it is not responsible to any other tribunal for the exercise of its discretion. Through this body, the people express and make effective their desires for a change in the law, and when this is done in clear and unmistakable language, the judiciary have no duty to pass upon the wisdom or expediency of the statute. To assume such a duty is a usurpation of power, and an attack upon the integrity of constitutional government.

Fellow members of the American Bar Association. We have all been sworn to support the Constitution of the United States and the constitutions of our several commonwealths. This association is the representative body of the bar of the United States. Upon the fidelity of the American bar to sound views of government, depends in great measure the future of republican government. In one sense, the bar receives the law from the bench, but in a larger sense, the law announced from the bench is that which the bench has received from the bar. In order, therefore, that the blessings of liberty may be preserved for us and those who may come after us, let the bar at all times clearly distinguish between the legislative and judicial functions; let its influence always be exerted to perpetuate the high powers of the judiciary by never encouraging any invasion of that field which the Constitution has entrusted to the legislature. Thus only will our government be perpetuated as "a government of laws and not of men."

Richard C. Dale.